No. 95-813

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRAD BENNETT, ET AL., PETITIONERS

v.

MICHAEL SPEAR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Petitioners, two ranchers and two water irrigation districts, brought the present action challenging a biological opinion issued by the U.S. Fish and Wildlife Service, pursuant to Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536, on the effects of the Bureau of Reclamation's long-term operation of the Klamath Irrigation Project on two endangered species of fish. The questions presented are as follows:

1. Whether petitioners have standing under Article III of the Constitution.

2. Whether petitioners' challenge to the biological opinion is cognizable under either the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or the citizen suit provision of the ESA, 16 U.S.C. 1540(g).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 63 F.3d 915. The order of the district court (Pet. App. 19-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1995. The petition for a writ of certiorari was filed on November 21, 1995, and was granted on March 25, 1996 (116 S. Ct. 1316). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] On July 4, 1994, Michael Spear replaced Marvin Plenert as Regional Director of the United States Fish and Wildlife Service.

STATUTORY PROVISIONS INVOLVED

Sections 7(a)(2) and 11(g) of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1536(a)(2) and 1540(g), are set forth at App., *infra*, 1a-4a.

STATEMENT

1. Congress enacted the Endangered Species Act of 1973 (ESA or Act) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species and designate their critical habitats. See 16 U.S.C. 1533.[2] The listed species at issue in this case are the Lost River sucker and the shortnose sucker, two fish that were listed as endangered on July 18, 1988. See 53 Fed. Reg. 27,130.

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior, see note 2, *supra*], insure that any action authorized, funded or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).[3]

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[2] The Secretary of the Interior and the Secretary of Commerce share responsibility for listing species and for other ESA duties. See 16 U.S.C. 1532(15). The Secretary of the Interior, who implements the ESA through the Fish and Wildlife Service (FWS or Service), has responsibility for the endangered species of fish at issue in this case. See 50 C.F.R. 17.11, 402.01(b). The National Marine Fisheries Service (NMFS) administers the Act with respect to the species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.23(a), 227.4.

[3] In addition, Section 9 of the ESA prohibits the taking of any endangered species within the United States. 16 U.S.C. 1538(a)(1). Section 4(d) of the Act authorizes the Secretary to promulgate regulations for the conservation of species listed as threatened, see 16 U.S.C. 1533(d), and the prohibitions included in Section 9 have been extended by regulation to threatened species, see 50 C.F.R. 17.31, 17.21. The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19); see *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995).

Regulations promulgated jointly by the two Secretaries furnish a structure for consultation. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b) and (c). Under the regulations, the agency proposing the action (the action agency) determines in the first instance whether a proposed action "may affect" a listed species. 50 C.F.R. 402.14. If the action agency determines that the proposed action "may affect" a listed species, it is then to enter into formal consultation with the Service, unless the action agency has concluded through preparation of a biological assessment or informal consultation that the action is not likely to adversely affect the listed species. *Ibid.*

Following formal consultation, the Service issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of the listed species. 16 U.S.C. 1536(b); 50 C.F.R. 402.14. If the Service concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A). If the opinion is "no jeopardy" or "jeopardy with reasonable and prudent alternatives," and if the proposed action or reasonable and prudent alternative will nevertheless effect an "incidental taking" of a listed species,[4] the biological opinion is accompanied by an incidental take statement. See 16 U.S.C. 1536(b)(4). That statement details the anticipated impacts to the listed species through incidental takings, specifies reasonable and prudent measures to minimize that impact,

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[4] "Incidental takings" are "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity." 50 C.F.R. 402.02.

and sets forth terms and conditions (including reporting requirements) that must be complied with by the action agency to implement those measures. 16 U.S.C. 1536(b)(4)(i), (ii) and (iv). If the action agency complies with the terms and conditions of the incidental take statement, any takings that result from its action are exempt from the taking prohibition of Section 9. See 16 U.S.C. 1536(*o*)(2).

After engaging in formal consultation, the action agency must determine "whether and in what manner to proceed with the action," in light of the Service's biological opinion and any other relevant information. 50 C.F.R. 402.15(a). Given the Secretary's "primary responsibility" for implementation of the Act, *National Wildlife Fed'n* v. *Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976), an agency that chooses to deviate from the Service's recommendations bears the burden of "articulat[ing] in its administrative record its reasons for disagreeing with the conclusions of a biological opinion." 51 Fed. Reg. 19,956 (1986) (preamble to FWS/NMFS regulations). In the government's experience, action agencies very rarely choose to engage in conduct that the Service believes will jeopardize a listed species. As a legal matter, however, the action agency retains the ultimate responsibility for determining whether, and in what manner, a proposed action can proceed in compliance with Section 7(a)(2)'s no-jeopardy mandate. See, *e.g.*, *Tribal Village of Akutan* v. *Hodel*, 869 F.2d 1185, 1193-1194 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989); *Roosevelt Campobello Int'l Park* v. *EPA*, 684 F.2d 1041, 1049 (1st Cir. 1982); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303-1304 (8th Cir. 1976); *National Wildlife Fed'n*, 529 F.2d at 371; 51 Fed. Reg. 19,928 (1986) (preamble to FWS/NMFS regulations explains that the consulting agency performs an "advisory function under section 7" and that the action agency "makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2)"); pages 21-22, *infra*.

Primary responsibility for enforcement and implementation of the ESA is entrusted to officials of the federal government. See, *e.g.*, 16 U.S.C. 1540(a), (b) and (e)(6). The Act also contains a provision for "citizen suits." That provision states that

> any person may commence a civil suit on his own behalf —
>
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency * * * who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof; or
>
> * * * * *
>
> (C) against the Secretary [of Commerce or the Interior] where there is alleged a failure * * * to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

16 U.S.C. 1540(g)(1).[5] A suit under Section 1540(g)(1)(A) may not be commenced "prior to 60 days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." 16 U.S.C. 1540(g)(2)(A)(i). Such suits are also barred if the Secretary has commenced civil enforcement proceedings, 16 U.S.C. 1540(g)(2)(A)(ii), or if the United States is "diligently prosecuting a criminal action" to redress the alleged violation, 16 U.S.C. 1540(g)(2)(A)(iii). Citizen suits against the Secretary under

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[5] A third class of citizen suits is now obsolete. See 16 U.S.C. 1540(g)(1)(B) (authorizing suits to compel the Secretary to impose prohibitions on takings during the 15 months that followed the enactment of the ESA in 1973).

Section 1540(g)(1)(C) for failure to perform nondiscretionary duties may not be brought "prior to sixty days after written notice has been given to the Secretary," unless the suit involves "an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants." 16 U.S.C. 1540(g)(2)(C).

2. The Secretary of the Interior authorized the creation of the Klamath Irrigation Project in 1905 in accordance with the Reclamation Act of 1902, 43 U.S.C. 372 *et seq.*, and the Act of February 9, 1905, ch. 567, 33 Stat. 714. Administered by the Bureau of Reclamation (Bureau or BOR), which is located within the Department of the Interior, the Project is composed of lakes, rivers, dams, and irrigation canals in southern Oregon and northern California. The Klamath Project currently serves approximately 240,000 irrigable acres. Gov't D. Ct. Br. Exh. 1, at 1.

Klamath Project water is stored primarily in Upper Klamath Lake and in other reservoirs in the Lost River system, including the Gerber Reservoir in Oregon and the Clear Lake Reservoir in California. Gov't D. Ct. Br. Exh. 1, at 1. The Project delivers water via a system of canals to lands within the Klamath Basin. Delivery operations begin in January, when water from the Klamath River is delivered to lands throughout the Lower Klamath area. *Id.* at 2. Typically, diversions from Upper Klamath Lake run from March or early April through October, and water is released from the Gerber and Clear Lake Reservoirs from mid-April until early October. *Id.* at 2-3. Normal lake elevations, river flows, and diversions of water within the Klamath Project system can be modified by flood or drought conditions. *Id.* at 3.

The volume of Klamath Project water provided to a water user is based on a number of factors, including the nature and extent of the state-based water rights, the

terms and conditions of the applicable contracts, the flood or drought conditions in the Klamath Basin, and the available water supply. See generally *California* v. *United States*, 438 U.S. 645 (1978); *O'Neill* v. *United States*, 50 F.3d 677 (9th Cir.), cert. denied, 116 S. Ct. 672 (1995); *Carson-Truckee Water Conservancy Dist.* v. *Clark*, 741 F.2d 257 (9th Cir. 1984). A state-initiated adjudication of water rights is currently ongoing to determine claims to surface water in the Klamath Basin in Oregon. See *United States* v. *Oregon*, 44 F.3d 758 (9th Cir. 1994), cert. denied, 116 S. Ct. 378 (1995). The Bureau is also in the process of developing a long-term operating plan for the Klamath Project. Pending completion of that plan, the allocation of water from the Klamath Project proceeds on a year-to-year basis.

3. In February 1992, the BOR completed and forwarded to the FWS a biological assessment of the effects of the long-term operation of the Klamath Project on listed species. See 16 U.S.C. 1536(c). The Bureau determined, *inter alia*, that the Project's operation might affect the Lost River and shortnose suckers. The Bureau therefore requested formal consultation with the FWS pursuant to 16 U.S.C. 1536 and 50 C.F.R. 402.14. Pet. App. 3; Gov't C.A. Br. 7-9.

In July 1992, the FWS issued a biological opinion. See J.A. 18-117. The FWS concluded that the "long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." Pet. App. 3. The FWS identified reasonable and prudent alternatives that it believed would avoid jeopardy, including the imposition of minimum lake levels for the Upper Klamath Lake and the Clear Lake and Gerber Reservoirs. *Ibid.*; see J.A. 86-92. Pursuant to 16 U.S.C. 1536(b)(4)(ii) and (iv), the biological opinion also identified reasonable and prudent measures intended to minimize the

extent of incidental takings associated with the operation of the Project, and terms and conditions for implementing those measures. J.A. 92-96. The Bureau notified the FWS that it intended to adopt the FWS's recommendations. Pet. App. 3.[6] The record contains no information concerning the effect, if any, that this statement of intention had on the operation of the Klamath Project for the balance of 1992 and/or any subsequent year.

4. Petitioners are two individual ranch operators and two irrigation districts in the State of Oregon. They receive Klamath Project water, including water stored in the Gerber and Clear Lake Reservoirs. In March 1993, petitioners filed the present action, seeking to compel the FWS to withdraw portions of its 1992 biological opinion. Pet. App. 31-44. Petitioners named as defendants two FWS officials and the Secretary of the Interior. *Id.* at 31-32. Neither the Bureau of Reclamation nor any of its officials was named as a defendant, and the Secretary was identified

[6] Subsequently, the Bureau reinitiated formal consultation on the Clear Lake Reservoir operations of the Klamath Project, based in part on its determination that the reasonable and prudent alternatives presented in the July 1992 biological opinion were not logistically feasible and that the Bureau had new information regarding the operation of the Clear Lake Reservoir. Gov't D. Ct. Reply Br. Exh. 2; see 50 C.F.R. 402.16. Based on a new operations model for Clear Lake Reservoir, the Bureau proposed the establishment of lower minimum lake levels than those suggested in the biological opinion and concluded that its revised proposed action was not likely to jeopardize the continued existence of the listed fish. In August 1994, the FWS issued a supplemental biological opinion, which included the establishment of such lower minimum lake levels with respect to the Clear Lake Reservoir as a modification of the reasonable and prudent alternatives set forth in the biological opinion. Gov't C.A. Br. 9 n.7. In addition, the Bureau has reinitiated formal consultation on the long-term operations of the entire Klamath Project. No biological opinion resulting from this latest consultation has yet been issued by the FWS.

only as the official "empowered by the ESA to make jeopardy determinations concerning threatened and endangered species." *Id.* at 35.

Petitioners asserted jurisdiction under the citizen suit provision of the ESA, 16 U.S.C. 1540(g)(1), and the federal question and declaratory judgment provisions of the Judicial Code, 28 U.S.C. 1331 and 28 U.S.C. 2201. Pet. App. 33. Their complaint alleged that the defendants (respondents in this Court) had violated the ESA and implementing regulations by (1) "improperly concluding * * * that the [Bureau's] continued operation of the Klamath Project * * * is likely to jeopardize the continued existence of the Lost River and shortnose suckers," *id.* at 40-41; (2) "improperly imposing restrictions on the withdrawal of irrigation water from Clear Lake and Gerber reservoirs," *id.* at 41; and (3) "implicitly determining critical habitat for the Lost River suckers and the shortnose suckers in Clear Lake and Gerber reservoirs * * * without considering the economic impact of that determination," *id.* at 42.[7]

5. The government moved to dismiss the complaint. The government pointed out that the Bureau rather than the FWS retained final authority over the allocation of Klamath Project water, and argued that petitioners' failure to name the BOR as a defendant or to challenge any action by the Bureau precluded their suit from going forward. See Gov't D. Ct. Br. 10-15. The district court granted the government's motion to dismiss. Pet. App. 19-

[7] Petitioners' complaint also alleged related claims attacking the biological opinion under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 40-42. In addition, their complaint alleged that respondents had violated the National Environmental Policy Act, 42 U.S.C. 4331 *et seq.*, by failing to perform an environmental analysis on the biological opinion's alleged *de facto* designation of critical habitat. Pet. App. 42-43.

29. The court observed that "the Secretary's biological opinion is advisory in nature and does not compel compliance with its recommendations or require agencies to act or refrain from acting in any particular manner." *Id.* at 24. It concluded that petitioners' interest in utilizing Klamath Project water "conflict[ed] with the Lost River and shortnose suckers' interest in using the water for habitat," and that petitioners "do not have standing under ESA based on an interest which conflicts with the interests sought to be protected by the Act." *Id.* at 27. The court also concluded that the biological opinion did not constitute a *de facto* determination of critical habitat for the endangered suckers. *Id.* at 28 n.4.

6. The court of appeals affirmed. Pet. App. 1-18. The court framed the question before it as "whether [petitioners'] action is precluded by the zone of interests test" —*i.e.*, the requirement first articulated in actions under the APA that a plaintiff challenging administrative agency action "must show that 'the interest sought to be protected by [him was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* at 4-5 (quoting *Association of Data Processing Serv. Org., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)) (brackets in original). The court determined that a zone of interests test applies to suits brought under the ESA's citizen suit provision, Pet. App. 6-11, and that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA," *id.* at 11. The court observed that petitioners' complaint "belies any assumption that they seek compliance with the statute in order to further the goal of species preservation." *Id.* at 16. Rather, the court continued, petitioners "claim a competing interest—an interest in using the very water that the government believes is necessary for the preservation

of the species." *Ibid.* Accordingly, the court held that petitioners lacked standing to bring their claims under the ESA, *id.* at 17, and it affirmed the district court's dismissal of the complaint, *id.* at 18.

SUMMARY OF ARGUMENT

I. Even if the allegations of petitioners' complaint are taken as true and are generously construed, petitioners have failed to satisfy the standing requirements of Article III of the Constitution. To invoke the jurisdiction of a federal court, a plaintiff must establish that (1) he has suffered an injury in fact that (2) is fairly traceable to the challenged conduct of the defendant and (3) is likely to be redressed by a favorable judicial ruling. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Petitioners' complaint fails to satisfy any of those three requirements. Their complaint alleged that the Bureau's acceptance of the FWS's recommendations would reduce the aggregate amount of water available from the Klamath Project. Petitioners did not allege, however, that acceptance of those recommendations would reduce the amount of water that *they* would receive. Absent such an allegation, petitioners' complaint fails adequately to allege injury in fact. Even if petitioners had adequately alleged a concrete injury, their complaint would not satisfy the other requirements for standing. The FWS's biological opinion did not legally compel the BOR to alter the manner in which it allocated Klamath Project water. Any injury that petitioners may have suffered is therefore traceable not to the FWS's issuance of the biological opinion, but to the Bureau's decisions regarding the allocation of Project water; yet petitioners failed either to name the Bureau as a defendant or to identify any action by the Bureau causing them harm. Any injury suffered by petitioners also would not be redressable by a favorable

judicial decision, since the Bureau would remain free to adopt the same water allocation policies, based on considerations wholly independent of the ESA, even if the FWS's biological opinion were withdrawn. Petitioners have therefore failed to satisfy the constitutional requirements for standing. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-44 (1976); *Defenders of Wildlife*, 504 U.S. at 568-571 (opinion of Scalia, J.); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

II. Even if petitioners satisfied the requirements of Article III, their present claims against the Service could not go forward, since no statutory waiver of sovereign immunity authorizes their suit.

A. The usual avenue for obtaining judicial review of federal agency action is the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, which authorizes review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704. This Court's decisions make clear, however, that an agency's recommendation to another governmental decisionmaker is not reviewable "final agency action." See *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992); *Dalton* v. *Specter*, 114 S. Ct. 1719 (1994). A biological opinion issued by the Service does not conclusively determine whether and how an agency may proceed with a project or other action. That determination is left to the action agency. In the instant case, the final decisions regarding the amounts and recipients of water releases from the Klamath Project were made by the Bureau of Reclamation. The biological opinion at issue in this case therefore is not subject to review under the APA, except in the context of a challenge to some final action taken by the Bureau in reliance upon the opinion.

B. Nor are petitioners' claims cognizable under the ESA citizen suit provision. That provision authorizes "any person" to commence a civil action "to enjoin any

person * * * who is alleged to be in violation of" the Act or implementing regulations, 16 U.S.C. 1540(g)(1)(A), or against the Secretary of Commerce or the Interior for failure to perform certain nondiscretionary duties relating to the process of listing endangered and threatened species, 16 U.S.C. 1540(g)(1)(C). Petitioners' suit is not cognizable under the latter provision, since petitioners have not alleged the breach of any such nondiscretionary duty. For two reasons, petitioners' suit is also not cognizable under Section 1540(g)(1)(A).

First, the text and history of the citizen suit provision make clear that Section 1540(g)(1)(A) is not a mechanism for judicial review of the Secretary's administration of the ESA. Section 1540(g)(1)(C), which authorizes citizen suits where the Secretary is alleged to have failed to perform certain nondiscretionary duties, would be superfluous if errors made by the Service in its implementation of the ESA were redressable under Section 1540(g)(1)(A) as "violations" of the Act. The history of the ESA citizen suit provision, and its relationship to similar provisions in other environmental statutes, provide further evidence that Section 1540(g)(1)(A) is inapplicable here. Section 1540(g)(1)(A) furnishes a means by which private plaintiffs may enforce the ESA against regulated parties—not a mechanism for challenging the Secretary's performance of his administrative duties under the Act, including the furnishing of biological opinions.

Even if Section 1540(g)(1)(A) could sometimes provide a basis for a suit challenging the Secretary's implementation of the ESA, it would not apply here. Any review under the citizen suit provision should be conducted in accordance with traditional principles of administrative law—and, in particular, with the rule that agency action is reviewable only when it is final and has a concrete impact on the challenging party. Because neither the text nor

the history of Section 1540(g)(1)(A) suggests that Congress intended to dispense with traditional requirements of finality and ripeness, that provision may not be used to attack the biological opinion in isolation from any action by the Bureau.

C. Contrary to petitioners' assertions, the non-cognizability of their current claims does not insulate a biological opinion from allegations that it recommended unreasonable restrictions on the use of natural resources. Decisions made by an action agency in reliance upon a biological opinion may be challenged either by persons asserting an interest in listed species or by persons asserting a competing interest in the resources in question. In either type of suit, a reviewing court may scrutinize the Service's biological opinion and may vacate the action agency's decision if it concludes that the biological opinion is arbitrary and capricious.

ARGUMENT

The ESA citizen suit provision authorizes "any person" to file a civil action "to enjoin any person, including the United States * * *, who is alleged to be in violation of" the Act or implementing regulations. 16 U.S.C. 1540(g)(1)(A). Petitioners have invoked that provision in a suit directly against the FWS to challenge a biological opinion issued by the FWS, arguing that the Service's conclusions were unsupported by the pertinent scientific data. Petitioners *assume* that the biological opinion could have been challenged in a suit directly against the FWS under Section 1540(g)(1)(A) by an environmental organization or other plaintiff claiming that the opinion was based on inadequate scientific evidence or analysis and was insufficiently protective of listed species. They argue that resource-users should have an equivalent right to invoke the citizen suit provision. As framed by petitioners, the

questions presented in this case are (1) whether a "zone of interests" test governs standing under the ESA citizen suit provision, and (2) if so, whether resource-users fall within that "zone of interests."

The government views this case from a fundamentally different perspective. We agree with the court of appeals that petitioners' challenge to the biological opinion is not cognizable under the citizen suit provision. We do not believe, however, that the proper disposition of this case involves the application of zone of interests standing principles. Rather, we believe that the basic *premise* of petitioners' argument is wrong: in our view, the biological opinion at issue here would *not* have been subject to challenge by plaintiffs asserting an interest in the protection of listed species, except within the context of a suit against the *Bureau of Reclamation* challenging actions it has taken in reliance on the Service's recommendations.

A biological opinion provides the Service's views as to whether and how a federal agency may proceed with a proposed action in a manner that does not jeopardize the continued existence of a listed species. Although the action agency typically gives very substantial weight to the Service's recommendations, it is not legally obligated to accept the Service's advice. Under the Administrative Procedure Act, the biological opinion therefore is not "final agency action" subject to a direct judicial challenge. Nothing in the ESA citizen suit provision authorizes a legal challenge to non-final administrative action (here, the issuance of the biological opinion) that is unreviewable under traditional principles of administrative law. When the action agency acts on the recommendations of the Service, however, the action agency's conduct *is* subject to judicial challenge, either by plaintiffs who assert an interest in the preservation of listed species, or by those who allege that the agency has imposed unreasonable

constraints on the use of natural resources. In reviewing such challenges, moreover, a court may scrutinize the biological opinion and its underlying administrative record (including the scientific evidence it contains) in order to assess the reasonableness of its conclusions.

The rule that a biological opinion may be challenged only within the context of a suit against the action agency imposes no special disability upon plaintiffs, like petitioners, who assert an economic interest in the use of natural resources. Rather, that rule applies equally to environmental plaintiffs alleging that the opinion is insufficiently protective of listed species. Plaintiffs seeking to challenge biological opinions have generally named action agencies as defendants and have identified specific actions taken (or intended to be taken) in reliance upon the biological opinions. Petitioners, by contrast, declined to name the Bureau as a defendant, and they failed to identify any action by the Bureau having a concrete impact upon their interests. Thus, the question in this case is not whether users of natural resources comprise a disfavored class of plaintiffs. The question instead is whether petitioners may evade the force of generally applicable rules governing the mode and timing of judicial review of federal agency action. We believe that that question should be answered in the negative, and that petitioners' suit was therefore properly dismissed.

In Part I below, we explain why petitioners lack standing under Article III to challenge the Service's issuance of the biological opinion. In Part II, we show that this suit should be dismissed even if petitioners are found to satisfy the constitutional requirements for standing, because

their claims directly against the FWS are not cognizable under either the APA or the ESA citizen suit provision.[8]

I. THE ALLEGATIONS OF PETITIONERS' COMPLAINT FAIL TO SATISFY THE REQUIREMENTS FOR STANDING UNDER ARTICLE III OF THE CONSTITUTION

Article III of the Constitution confines the jurisdiction of the federal courts to actual "cases" and "controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), this Court reviewed the principles governing standing to sue in the context of an ESA case. The Court reiterated that plaintiffs seeking to invoke a federal court's jurisdiction must establish (1) that they have suffered an "injury in fact"—an "invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *id.* at 560 (citations and internal quotation marks

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[8] Those arguments are properly before the Court. The government argued below that claims that federal agencies have done more than necessary to avoid jeopardy to a protected species are not cognizable under the ESA citizen suit provision; that the FWS's biological opinion itself had no direct impact on petitioners; that it therefore was questionable that the biological opinion constituted final agency action; and that petitioners' suit would instead properly lie against the Bureau of Reclamation. Gov't C.A. Br. 22 n.15, 23-26 & n.17. A respondent "is entitled under [the Court's] precedents to urge any grounds which would lend support to the judgment below," *Dayton Board of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977), and the Court in any event has an independent obligation "to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,'" *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934)).

omitted); (2) that their injury is fairly traceable to the challenged action of the defendant, and not the result of the "independent action of some third party not before the court," *ibid.* (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); and (3) that it is " 'likely' as opposed to merely 'speculative,' that their injury will be 'redressed by a favorable decision,' " *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38). See also, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Those three elements are the "irreducible minimum," *Valley Forge Christian College*, 454 U.S. at 472, required by Article III.

"For purposes of ruling on a motion to dismiss, * * * both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); cf. *Defenders of Wildlife*, 504 U.S. at 561 (stating that, on a motion to dismiss, the court presumes that general factual allegations embrace those specific facts necessary to support the claim). Even at the pleading stage, however, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518; see *FW/PBS Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990). Thus, petitioners must "allege * * * facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." *Ibid.* (citations and internal quotation marks omitted). In the present case, the allegations of petitioners' complaint, even if liberally construed, satisfy none of the three elements of standing.

A. Petitioners Have Failed To Allege Facts Which, If Taken As True, Would Demonstrate That They Have Suffered Injury In Fact

The complaint in this case alleges that petitioners Bennett and Giordano receive irrigation water from Clear Lake Reservoir, Pet. App. 33; that petitioners Horsefly Irrigation District and Langell Valley Irrigation District receive irrigation water from Clear Lake Reservoir via Lost River "pursuant to contracts with the United States," *id.* at 34; that "the BOR will abide by the restrictions imposed by the Biological Opinion," *id.* at 32; and that "[t]he restrictions on lake levels imposed in the Biological Opinion adversely affect [petitioners] by substantially reducing the quantity of available irrigation water," *id.* at 40. Petitioners have adequately alleged that the recommendations contained in the biological opinion, if adopted by the Bureau, would reduce the *aggregate* amount of water available from the Klamath Project. Petitioners have not alleged, however, that *they* have received, or can be expected to receive, less water than would otherwise have been allocated to them. Petitioners' complaint focuses on the biological opinion prepared by the FWS; it contains no allegations regarding the Bureau's water allocation practices beyond the assertion that "the BOR will abide by the restrictions imposed by the Biological Opinion." Pet. App. 32. The biological opinion, however, recommends the maintenance of minimum lake levels but does not address the manner in which available water is to be divided among interested parties. See J.A. 86-92.

"[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Defenders of Wildlife*, 504 U.S. at 563 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734-735 (1972)). Because petitioners have not

alleged that *they* will receive reduced quantities of water, their complaint fails to satisfy the injury in fact requirement of Article III.

B. Any Injury Suffered By Petitioners Is Not Fairly Traceable To The FWS's Issuance Of The Biological Opinion

The Secretaries of the Interior and Commerce exercise "primary responsibility" for implementation of the ESA. *National Wildlife Fed'n* v. *Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976). Cf. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2416 (1995) (Secretary's interpretation of ESA provision is entitled to deference in light of "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement"). The requirement that the Service prepare a biological opinion promptly upon request, see 16 U.S.C. 1536(b), would be largely superfluous if action agencies were expected routinely to duplicate the Service's efforts to assess the likely impact of proposed actions on listed species. The statutory scheme thus presupposes that the biological opinion will play a central role in the action agency's decisionmaking process, and that it will typically be based on an administrative record that is fully adequate for the action agency's decision insofar as ESA issues are concerned. And because a reviewing court will give substantial deference to the Service's views,[9] a federal

[9] See H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12 (1979) (noting with approval that "[c]ourts have given substantial weight to [the Service's] biological opinions as evidence of an [action] agency's compliance with Section 7(a)"); H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12 (1978); 51 Fed. Reg. 19,956 (1986) ("Federal courts have accorded Service biological opinions great deference.").

agency that chooses to deviate from the recommendations contained in a biological opinion bears the burden of "articulat[ing] in its administrative record its reasons for disagreeing with the conclusions of a biological opinion." 51 Fed. Reg. 19,956 (1986). In the government's experience, action agencies very rarely choose to engage in conduct that the Service has concluded is likely to jeopardize the continued existence of a listed species.

As a legal matter, however, the action agency retains the ultimate responsibility for determining whether and how a proposed action may go forward in compliance with Section 7(a)(2)'s no-jeopardy mandate. See 16 U.S.C. 1536(b)(3)(A); *Tribal Village of Akutan* v. *Hodel*, 869 F.2d 1185, 1193-1994 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989); *Roosevelt Campobello Int'l Park* v. *EPA*, 684 F.2d 1041, 1049 (1st Cir. 1982); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303-1304 (8th Cir. 1976); *National Wildlife Fed'n*, 529 F.2d at 371. When Congress amended the ESA in 1978, substantially revising the consultation process, the House Committee observed that

> [a]ny determination by the Fish and Wildlife Service that the activity may jeopardize the continued existence of listed species does not necessarily mandate any particular action by the acting agency. The section 7 regulations make it clear that it is the responsibility of the acting agency to determine whether to proceed with the activity or program as planned in light of its Section 7 obligations.

H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12 (1978). Regulations published jointly by the FWS and the NMFS in 1986 state that, "[f]ollowing the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion."

50 C.F.R. 402.15(a). The preamble to those regulations explains that the Service performs an "advisory function under section 7" and that the action agency "makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2)." 51 Fed. Reg. 19,928 (1986).[10] The biological opinion at issue in the instant case therefore did not compel the Bureau to adopt higher lake levels. That opinion, moreover, contains no recommendations at all regarding the allocation of available water among potential recipients. If petitioners have suffered injury, the proximate cause of their harm is an (as yet unidentified) decision by the Bureau regarding the volume of water allocated to petitioners, not the biological opinion itself.

This does not mean that the biological opinion is shielded from judicial scrutiny. If an action agency adopts the Service's recommendations, or proceeds with a proposed action in reliance on the Service's no-jeopardy determination, the propriety of its actions will ultimately depend upon the rationality of the Service's analysis. Accordingly, judicial review of the action agency's conduct properly may include review of the analysis and recommendations contained in the biological opinion, and of the

[10] The Services have consistently recognized that the action agency retains the legal authority to accept or reject the recommendations contained in a biological opinion. Thus, joint FWS/NMFS regulations issued in 1978 stated that, "[u]pon receipt and consideration of the biological opinion and recommendations of the Service, it is the responsibility of the Federal agency to determine whether to proceed with the activity or program as planned in light of its section 7 obligations." 50 C.F.R. 402.04(g) (1978). The preamble to those regulations confirmed that once consultation has taken place, "the ultimate responsibility for determining agency action in light of section 7 still rests with the particular Federal agency that was engaged in consultation." 43 Fed. Reg. 871 (1978).

scientific evidence before the Service, in order to determine whether the opinion is supported by sufficient evidence to satisfy the arbitrary and capricious standard of review. Cf. *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 778 (1984).[11] If the court finds the recommendations contained in the biological opinion to be arbitrary and capricious, the appropriate relief would be to vacate the action agency's decision and remand to the action agency for further consideration, perhaps informed by renewed consultation with the Service. Thus, while petitioners are not entitled to challenge the FWS's biological opinion in isolation from any action by the Bureau, the opinion would ultimately be reviewable

[11] In *Escondido*, the Court held that Section 4(e) of the Federal Power Act required the Federal Energy Regulatory Commission to accept without modification any conditions that the Secretary of the Interior directed to be included in licenses for hydroelectric facilities located on or near Indian reservations. 466 U.S. at 772-779. Judicial review of the license, the Court observed, would include consideration of whether those conditions were reasonable, consistent with the statute, and supported by substantial evidence. *Id.* at 778. Thus, while the challenged order would be that of the Commission (*i.e.*, the issuance of the license), the reviewing court would scrutinize the determinations made by the Secretary under the same (deferential) standard that would apply to direct review of the Secretary's conduct. *Ibid.*; cf. *Martin* v. *OSHRC*, 499 U.S. 144 (1991) (court reviewing an order of the Occupational Safety and Health Review Commission gives deference to the Secretary of Labor's construction of an ambiguous regulation). Where an action agency adopts the recommendations contained in a biological opinion, we believe that a similar mode of judicial review is appropriate. If the action agency chooses to deviate from the Service's recommendations, by contrast, review should focus on the reasonableness of and evidentiary support for that decision. Cf. 51 Fed. Reg. 19,956 (1986) (where action agency deviates from the Service's recommendations, it is "incumbent upon [the action] agency to articulate in its administrative record its reasons for disagreeing with the conclusions of a biological opinion").

within the context of a legal challenge to the Bureau's allocation of water.[12]

Contrary to petitioners' assertions (Br. 42, 43), we do not contend that "there is no connection between the biological opinion issued by the USFWS and re-operation of the Klamath Project by the Bureau," or that the biological

[12] Judicial assessment of the biological opinion would be based on the administrative record compiled by the Service, even though that record would not routinely be provided in its entirety to the action agency. See 16 U.S.C. 1536(b)(3)(A) ("Promptly after conclusion of consultation * * *, the Secretary shall provide to the Federal agency * * * a written statement setting forth the Secretary's opinion, and a *summary* of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.") (emphasis added). Plaintiffs challenging agency actions taken in reliance on the Service's biological opinions frequently name the Service or the Secretary as a co-defendant. The Department of Justice does not object to that practice. In our view, however, the presence or absence of the Service as a defendant should not affect the manner in which the district court record is compiled or the standard by which the court reviews the action agency's conduct. Where an action agency adopts the recommendations contained in a biological opinion, we believe that a court reviewing the action agency's conduct should (1) admit into evidence the Service's administrative record supporting the biological opinion and (2) vacate the action agency's decision if the court found the analysis or recommendations contained in the biological opinion to be arbitrary and capricious, *whether or not the Service or the Secretary was named as a defendant*. If a court disagreed, however, and concluded that the Service's administrative record would be admissible into evidence only if the Service itself were a party, the proper response would be to join the Service as a defendant—not to decline to consider its administrative record. Both as a legal and a practical matter, meaningful judicial review of the biological opinion would be impossible if the court was foreclosed from examining the materials from which that opinion was derived. Our point is simply that the ultimate basis and focus of judicial review is a challenge to action taken by the action agency in reliance on the biological opinion, not the biological opinion standing alone.

opinion should be regarded "as a meaningless piece of paper." The statutory and regulatory scheme unquestionably presupposes that action agencies will give substantial weight to the views of the Service. The consultation process, however, is not an end in itself: it is a means of assisting federal agencies to fulfill *their* substantive obligations under Section 7(a)(2) of the Act to ensure that their actions will not jeopardize the continued existence of a listed species. The Bureau, not the FWS, is ultimately responsible for ensuring that the Klamath Project is operated in compliance with the ESA's requirements, and the Bureau retains legal authority to accept or reject the Service's recommendations. If the Bureau adopts the recommendations contained in the biological opinion, its actions are subject to judicial review at the behest of persons injured by them, and the court in conducting such review may assess the adequacy of the biological opinion—with deference, of course, to the scientific judgments of the expert agency. Review of the biological opinion is available, however, only after the Bureau has acted, and only within the context of a challenge to specific actions taken by the Bureau in reliance on that opinion.[13]

[13] Where the Secretary concludes that a proposed action is likely to result in the incidental taking of a protected species, the biological opinion is accompanied by an incidental take statement that identifies the level of anticipated taking associated with the agency action, specifies "reasonable and prudent measures" to minimize that taking, and sets forth terms and conditions to implement those measures. 16 U.S.C. 1536(b)(4)(i), (ii), and (iv). Those takings that are in compliance with the terms and conditions specified under Section 1536(b)(4)(iv) are exempt from the takings prohibition of Section 9. See 16 U.S.C. 1536(*o*)(2).

Even where a biological opinion is accompanied by an incidental take statement, neither the biological opinion nor the incidental take statement legally compels or prohibits any conduct by the action agency. Actions inconsistent with the terms and conditions of the

C. Any Injury Suffered By Petitioners Is Not Redressable By A Favorable Judicial Ruling

Petitioners have not sought any relief directed against the Bureau's operation of the Klamath Project. Rather, they have requested a judicial order setting aside the biological opinion. See Pet. App. 43-44. Petitioners' request for such a ruling fails to satisfy the redressability requirement of Article III.

The fact that a contemplated agency action will not jeopardize the continued existence of a listed species does not mean that the agency is required to carry out that action. In the present case, a variety of factors wholly apart from ESA concerns may affect the Bureau's deci-

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incidental take statement are not *per se* unlawful; they simply "remain subject to the prohibition against takings that is contained in section 9." S. Rep. No. 418, 97th Cong., 2d Sess. 21 (1982). As a practical matter, an action agency is very unlikely to risk Section 9 liability by deviating from the terms and conditions set forth in the incidental take statement, since an incidental take statement is issued only when the Service believes that a taking is likely. The action agency remains legally free, however, to carry out the proposed action without conforming to those terms and conditions if it concludes that the action will not in fact cause a taking—subject to the risk that a reviewing court will determine that an unauthorized taking has occurred or can be expected to occur, and that the agency is therefore in violation of Section 9.

In the present case, moreover, the aspect of the biological opinion document that is the subject of petitioners' challenge—namely, the Service's identification of "reasonable and prudent alternatives" that included maintenance of higher water levels at the Clear Lake and Gerber reservoirs, see Pet. App. 39-40—is separate and distinct from the incidental take statement. See J.A. 86-92 (reasonable and prudent alternatives), 92-96 (incidental take statement). Thus, so long as the BOR fulfilled its obligations under Section 7(a)(2) by operating the Project in a manner that did not jeopardize listed species, the Bureau was not required to maintain the higher lake levels in order to comply with the terms and conditions of the incidental take statement.

sions regarding the storage, distribution, and delivery of irrigation water within the Klamath Basin. The ultimate effect of a judicial decision invalidating the biological opinion is therefore dependent upon the actions of the Bureau, "whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 43; *Defenders of Wildlife*, 504 U.S. at 568-571 (opinion of Scalia, J.). If the Bureau of Reclamation allocates water in a manner that injures petitioners, and its action is determined to be unlawful, petitioners' injury would be redressable by an appropriate judicial order directed against the Bureau. But in the absence of any challenge to a final decision by the BOR, it is purely speculative whether a judicial order running against the Service would enable petitioners to obtain additional water.

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The requirement that plaintiffs establish injury, causation, and redressability "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College*, 454 U.S. at 472. Petitioners' suit directly implicates those pragmatic concerns. At the time this suit was filed, it was possible (insofar as can be determined from the allegations of the complaint) that the Bureau would decline to adopt the recommendations contained in the biological opinion;[14] that those recommenda-

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[14] By the time the complaint in this case was filed, the Bureau had informed the Service that it intended to act in accordance with the

tions, even if implemented, would have no effect on the volume of water available to petitioners; or that the Bureau would assert an independent justification for adopting the higher lake levels recommended by the Service. If any of those events had occurred, the court's resolution of petitioners' challenge to the biological opinion would have had no concrete impact on petitioners' interests.

Once the Bureau arrived at a final decision concerning the allocation of Klamath Project water, petitioners could have sought judicial review of that decision under the APA (if the decision caused them injury) by alleging that the Bureau's refusal to release additional water was arbitrary and capricious. 5 U.S.C. 706(2)(A); see, *e.g.*, *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993). Alternatively, petitioners might have contended that some *other* provision of law required the Bureau to allocate additional water. See 43 U.S.C. 390uu; cf. *Nebraska* v. *Wyoming*, 115 S. Ct. 1933, 1942, 1944-1945 (1995) (recognizing that challenges to operation of reclamation projects may be brought in federal district court). If the Bureau had then defended its actions by relying on the biological opinion, judicial review of the Bureau's conduct would focus on whether the recommendations proffered by the Service were arbitrary and capricious. That review would include an assessment of the scientific evidence and analyses on which the Service relied. See pages 22-23, *supra*. Thus, dismissal of petitioners' complaint would not permanently insulate the biological opinion from judicial scrutiny. It would simply ensure

analysis and recommendations contained in the biological opinion. See Gov't D. Ct. Br. Exh. 6. The record contains no information, however, regarding whether and when the Bureau actually altered its water allocation practices in response to the biological opinion.

that such scrutiny would not occur unless and until the Bureau acted upon the Service's recommendations in a manner that caused petitioners harm, and that it would occur within the context of a suit between petitioners and the agency directly responsible for their alleged injury.[15]

[15] In *Defenders of Wildlife*, the Court observed that "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." 504 U.S. at 572 n.7. The Court explained that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." *Ibid*. For three reasons, that principle does not control this case.

First, the hypothetical case described in *Defenders of Wildlife* involved a procedural breach committed by the same agency whose actions were ultimately responsible for the plaintiff's injury. The Court did not cast doubt on the rule that standing is ordinarily absent where the nexus between the unlawful conduct and the plaintiff's injury involves independent action by a third party not before the court. Second, a right to insist upon particular procedures would often be substantially undermined if it could be asserted only where the outcome of those procedures could be forecast with certainty. The premise of an EIS requirement, for example, is that the environmental consequences (and thus the propriety) of a particular project cannot accurately be determined without an EIS. In the present case, by contrast, any legal challenge petitioners may have to the Bureau's final decisions regarding the allocation of Klamath Project water can be asserted after those decisions have been made.

Finally, the Court in *Defenders of Wildlife* did not dispense with the requirement that plaintiffs adequately allege injury in fact. The hypothetical plaintiff in *Defenders of Wildlife* was described as living next to the dam site; there was no question that the challenged federal action (construction of the dam) would ultimately (although not immediately) cause that plaintiff injury, and likewise no question that an injunction barring construction unless an EIS were prepared would

II. EVEN IF PETITIONERS MET THE REQUIREMENTS OF ARTICLE III, THEIR SUIT COULD NOT GO FORWARD, BECAUSE THEIR CLAIMS ARE NOT COGNIZABLE UNDER EITHER THE ADMINISTRATIVE PROCEDURE ACT OR THE ESA CITIZEN SUIT PROVISION

For the foregoing reasons, petitioners fail to satisfy the requirements of Article III. Even if this Court holds to the contrary, however, it would not follow that petitioners' suit can go forward. A determination that petitioners meet the requirements of Article III would mean only that Congress *could* authorize the adjudication of this lawsuit by the federal courts—not that it has done so. "It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued." *United State* v. *Mitchell*, 445 U.S. 535, 538 (1980) (brackets and internal quotation marks omitted). Even if petitioners are found to have Article III standing to bring this action, no statutory waiver of sovereign immunity authorizes their challenge to the Service's biological opinion outside the context of a suit against the action agency challenging that agency's conduct.

A. Petitioners' Suit Cannot Proceed Under The Administrative Procedure Act Because The Issuance Of A Biological Opinion Is Not A Reviewable "Final Agency Action"

The usual avenue for obtaining judicial review of federal agency action is the APA, which provides, *inter alia*, for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Issu-

redress that injury (albeit perhaps only temporarily). In the present case, by contrast, petitioners have failed to allege that they have received (or can be expected to receive) less water than they desire.

ance of the biological opinion in this case was not "final agency action" because it did not conclusively determine the manner in which Klamath Project water would be allocated. Rather, the final decisions regarding the amounts and recipients of water releases were made by the Bureau of Reclamation. The Service's issuance of the biological opinion therefore was not subject to review under the APA, except within the context of a challenge to the Bureau's ultimate decisions regarding the allocation of water.

This Court considered a similar issue in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992). Under the Census Act, the Secretary of Commerce is required to report to the President "[t]he tabulation of total population by States." 13 U.S.C. 141(b); see 505 U.S. at 792. The President is then required to "transmit to the Congress a statement showing the whole number of persons in each State, * * * and the number of Representatives to which each State would be entitled." 2 U.S.C. 2a(a); see 505 U.S. at 792. Although no President has ever transmitted to the Congress census figures different from those reported to him by the Secretary, see *id.* at 812-813 (Stevens, J., concurring in part and concurring in the judgment), the Court construed the pertinent statutes as authorizing the President to do so, see *id.* at 796-800.

Because the President retained legal authority to amend the figures reported by the Secretary, the Court held, the Secretary's report was not "final agency action" reviewable under the APA. 505 U.S. at 796-800.[16] In

[16] Four Justices would have held that the Secretary's report constituted reviewable "final agency action." See 505 U.S. at 808-816 (Stevens, J., concurring in part and concurring in the judgment). Those Justices concluded that the President's role under the statutory scheme was purely ministerial, and that the President lacked the legal authority to amend the figures reported to him by the Secretary. See

determining whether particular conduct constitutes "final agency action," the Court explained, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.* at 797.[17] "Because the Secretary's report to the President carries no direct consequence for the reapportionment," the Court concluded, that report was "not final and therefore not subject to review." *Id.* at 798 (citation and internal quotation marks omitted). Cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-113 (1948) ("administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process").

The Court reiterated that principle two Terms later in *Dalton* v. *Specter*, 114 S. Ct. 1719 (1994). *Dalton* involved the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808. Under that Act, the Secretary of Defense was required to submit

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id. at 810-813. The concurring Justices did not suggest, however, that a non-binding agency recommendation to another decisionmaker would constitute "final agency action."

[17] The Court's disposition of the case makes clear that both halves of that question must be answered in the affirmative before an agency pronouncement will be regarded as "final agency action." The Department of Commerce had clearly "completed its decisionmaking process" when it issued its report to the President. That report was nevertheless deemed not to be "final agency action" that would "directly affect the parties," since the President retained the final authority to accept or reject the figures contained therein. Similarly here, the biological opinion represented the FWS's concluded view regarding the Klamath Project's likely impact upon listed species, but it was not "final agency action" within the meaning of the APA, since the Bureau retained ultimate legal authority over the allocation of Project water.

recommendations concerning the closure of military installations to the Defense Base Closure and Realignment Commission, an independent body. 114 S. Ct. at 1722. The Commission would then submit a report to the President, who was given two weeks in which to decide whether to approve or disapprove, in their entirety, the Commission's recommendations. *Ibid.* Plaintiffs sought review of the recommendations submitted by the Secretary and the Commission. The Court held that "[a] straightforward application of *Franklin*" foreclosed review of those recommendations under the APA, *id.* at 1724, explaining that "the President, not the Commission, takes the final action that affects the military installations," *id.* at 1725 (brackets and internal quotation marks omitted).

Under *Franklin* and *Dalton*, the Service's issuance of a biological opinion is not "final agency action." Whatever the practical likelihood that the BOR would adopt the reasonable and prudent alternatives (including the higher lake levels) identified by the Service, the Bureau was not legally obligated to do so. Even if the Bureau decided to adopt the higher lake levels, moreover, nothing in the biological opinion would constrain the BOR's discretion as to how the available water should be allocated among potential users. Like the reports at issue in *Franklin* and *Dalton*, the biological opinion therefore "carries no direct consequence" for the release of water to petitioners or other users. *Franklin*, 505 U.S. at 798; *Dalton*, 114 S. Ct. at 1724. It is the Bureau, not the FWS, that "takes the final action that affects" the allocation of water from the Klamath Project. *Id.* at 1725. Thus, even if petitioners met the requirements of Article III, they could not obtain

APA review of the biological opinion, except in the context of a challenge to actions by the BOR.[18]

The insusceptibility of the biological opinion to a judicial challenge independent of a decision by the action agency is further supported by the pragmatic considerations underlying the doctrine of ripeness.[19] The "basic rationale" of ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967); see also *National Wildlife Fed'n*, 497 U.S. at 891. Judicial review of a biological opinion independent of any challenge to the action agency's decision would cause the disruption and

[18] Unlike *Franklin*, the instant case invoives a recommendation submitted by one co-equal agency to another, not a recommendation submitted by a subordinate to a superior within the same chain of command. Nothing in *Franklin* suggests, however, that the Court found dispositive the general subordinacy of the Secretary of Commerce to the President. The Court's analysis focused instead on the President's legal authority to reject the Secretary's recommendation with respect to a particular matter.

[19] Although ripeness doctrine and the APA requirement of "final agency action" serve complementary purposes, they are not identical. "An agency action can be final, with no further administrative remedies available to a petitioner, and yet it can still fail to be 'ripe' for judicial review. The best example of this situation is an agency rule that is worded so broadly that a court cannot determine whether, or to what extent, it will cause harm to the petitioner or raise the legal issues the petitioner has asked the court to address." Kenneth Culp Davis & Richard J. Pierce, Jr., II *Administrative Law Treatise* 361 (3d ed. 1994). See, *e.g.*, *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485, 2495-2496 (1993); *National Wildlife Fed'n*, 497 U.S. at 891-893.

inefficiency that ripeness principles are intended to prevent. Until the Bureau has considered the biological opinion, in conjunction with other factors bearing upon its water allocation decisions, there can be no certainty as to what those decisions will be, how they will affect particular parties, or what alternative bases might underlie the Bureau's actions. As we explain above, we believe that this uncertainty is fatal to petitioners' efforts to establish standing under Article III. But whether or not those considerations are of constitutional moment, under well-established principles of administrative law they should preclude judicial review in the absence of a clear congressional directive to permit it.[20]

B. The Citizen Suit Provision Of The Endangered Species Act Provides No Basis For Adjudication Of Petitioners' Suit

Although petitioners' complaint relied in part on the APA, see Pet. App. 40-43, they place principal reliance on the ESA citizen suit provision. That provision states in relevant part that

> any person may commence a civil suit on his own behalf —

[20] As we explain above, see pages 22-23, *supra*, the biological opinion *would* be subject to judicial scrutiny in the context of a legal challenge to actions taken by the Bureau in reliance upon that opinion. That mode of review is consistent with the text of the APA, which provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704; see *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232, 245 (1980). That avenue for reviewing a non-binding recommendation was not available in *Franklin* and *Dalton*: because the final decisionmaker (the President) was not an "agency" within the meaning of the APA, see *Franklin*, 505 U.S. at 800-801, there was no "final agency action" to review.

> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency * * *, who is alleged to be in violation of any provision of [the Act] or regulation issued under the authority thereof; or
>
> * * * * *
>
> (C) against the Secretary [of Commerce or the Interior] where there is alleged a failure * * * to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

16 U.S.C. 1540(g)(1).[21]

The ESA citizen suit provision does not apply to petitioners' claims. The Service's issuance of the biological opinion at issue here was not a failure to perform a nondiscretionary duty under 16 U.S.C. 1533. Issuance of what a court might find to be an unpersuasive or inadequately supported biological opinion, moreover, would

[21] As this Court noted in *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 23 & n.1 (1989), a number of federal environmental statutes contain citizen suit provisions patterned after the citizen suit provision of the Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1706. See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 347 n.29 (1990) (citizen suit provisions of various environmental statutes "are virtually identical, largely because they were 'lifted' from the first such provision in the 1970 Clean Air Act"); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 Envtl. L. Rptr. 10,309, 10,311 (1983) ("There are perhaps no sections of the environmental statutes where precedent under one statute so clearly applies to others."). The citizen suit provisions typically "authorize 'any person' to commence suit to enforce the requirements of the acts against 'any person' alleged to violate them or to require the government to perform a mandatory duty under the acts." *Id.* at 10,311-10,312 (footnotes omitted). The ESA citizen suit provision conforms to that pattern.

not place the Secretary "in violation of" the Endangered Species Act or its implementing regulations.

1. ***The Service's issuance of the biological opinion in this case did not constitute a failure to perform a nondiscretionary duty under 16 U.S.C. 1533***

The conduct complained of in this case was not "a failure * * * to perform any act or duty under section 1533 of [Title 16] which is not discretionary with the Secretary." 16 U.S.C. 1540(g)(1)(C). Petitioners have not contended that the Service failed to issue a biological opinion—only that the conclusions articulated in the opinion were unsupported by the pertinent scientific data.[22] In any event, Section 1540(g)(1)(C) applies only where the Secretary fails to perform a nondiscretionary duty "under section 1533" of Title 16. The consultation process (including the issuance of biological opinions) is governed by Section 1536 of Title 16. Indeed, while petitioners' complaint cites Section 1540(g)(1)(C) as a basis for district court jurisdiction, see Pet. App. 41, 42, neither the complaint, the petition, nor petitioners' brief

[22] The nondiscretionary duty sections of the various citizen suit provisions have been given a narrow construction. See, *e.g.*, *Monongahela Power Co.* v. *Reilly*, 980 F.2d 272, 276 n.3 (4th Cir. 1993) (citing cases); *Environmental Defense Fund* v. *Thomas*, 870 F.2d 892, 899 (2d Cir.) ("the district court has jurisdiction * * * to compel the Administrator to perform purely ministerial acts"), cert. denied, 493 U.S. 991 (1989); *Sierra Club* v. *Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) ("In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must categorically mandate that *all* specified action be taken by a date-certain deadline.") (brackets and internal quotation marks omitted). Cf. *id.* at 792 ("We long ago rejected * * * the convoluted notion that EPA is under a nondiscretionary duty—for purposes of [the Clean Air Act citizen suit provision]—not to abuse its discretion.").

on the merits identifies any nondiscretionary duty that the Service is alleged to have failed to perform.[23]

2. *Issuance of an inadequate or erroneous biological opinion would not place the Secretary "in violation of" the ESA or implementing regulations*

Petitioners' principal contention is that judicial review of the biological opinion is available under 16 U.S.C. 1540(g)(1)(A), which authorizes injunctive actions against

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[23] Petitioners' complaint alleged that the Secretary had violated 16 U.S.C. 1533(b)(2) and its implementing regulations by "implicitly determining critical habitat for the Lost River suckers and the shortnose suckers * * * without considering the economic impact of that determination." Pet. App. 42. Even if that claim had merit, it would not be cognizable under Section 1540(g)(1)(C), since even an arbitrary and capricious designation of critical habitat would not constitute a failure to perform a nondiscretionary duty. See note 22, *supra*.

In any event, petitioners' claim has no basis in law. Critical habitat may be designated only through notice and comment rulemaking under Section 4(a)(3) of the ESA, 16 U.S.C. 1533(a)(3). (Pursuant to Section 4(a)(3), the Secretary of the Interior has proposed a rule designating critical habitat for the endangered Lost River sucker and shortnose sucker. See 59 Fed. Reg. 61,744 (1994).) The requirement that the Secretary "tak[e] into consideration the economic impact * * * of specifying any area as critical habitat," 16 U.S.C. 1533(b)(2), applies only to the official designation of critical habitat pursuant to Section 4(a)(3). Contrary to petitioners' apparent premise, the Service's conclusion that use or destruction of particular natural resources would jeopardize a listed species does not represent an "implicit" designation of critical habitat. See 51 Fed. Reg. 19,927 (1986) ("An action could jeopardize the continued existence of a listed species through the destruction or adverse modification of its habitat, regardless of whether that habitat has been designated as 'critical habitat.'"). Indeed, the Service is not permitted—let alone required—to consider economic impacts in making the *scientific* determination whether a proposed action will or will not jeopardize the continued existence of a listed species.

any person "who is alleged to be in violation of" the ESA or its implementing regulations. For two reasons, petitioners' reliance on Section 1540(g)(1)(A) is misplaced.

a. In addition to the requirements and prohibitions applicable to persons whose on-the-ground conduct may harm a listed species, the ESA and its implementing regulations contain numerous provisions governing the Secretary's implementation of the Act. Conduct by the Secretary that is inconsistent with such provisions might in a sense be said to constitute a "violation" of the Act or regulations. The text and history of the ESA citizen suit provision indicate, however, that Section 1540(g)(1)(A) is not intended to serve as an alternative avenue for judicial review of the Secretary's implementation of the statute. Section 1540(g)(1)(A) furnishes a means by which nonfederal actors may enforce the provisions of the ESA against regulated parties—not an additional mechanism for challenging the Secretary's performance of his duties as administrator of the Act.

i. The strongest textual evidence on this point is Section 1540(g)(1)(C), which authorizes citizen suits in cases where the Secretary is alleged to have failed to perform a nondiscretionary duty under Section 1533. See pages 37-38, *supra*. That provision would be superfluous if errors by the Secretary in his implementation of the ESA were subject to challenge under Section 1540(g)(1)(A) as "violations" of the Act.[24] The citizen suit provision also

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[24] Section 1540(g)(1)(C) was added to the ESA in 1982, together with amendments to Section 1533 that imposed timetables for action by the Secretary on petitions to list threatened or endangered species. See Pub. L. No. 97-304, § 7(2), 96 Stat. 1425. The Senate Report accompanying the 1982 amendments explained that Section 1540(g)(1)(C) "would amend the citizen suit provision of the Act to authorize actions against the Secretary for failure to perform the acts and duties that are imposed by" other provisions of those amendments. S. Rep. No. 418,

states that an action under Section 1540(g)(1)(A) may not be brought "prior to sixty days after written notice of the violation has been given to the Secretary and to any alleged violator of any such provision or regulation," 16 U.S.C. 1540(g)(2)(A)(i), or if civil or criminal enforcement proceedings are ongoing, see 16 U.S.C. 1540(g)(2)(A)(ii) and (iii). The requirement that notice be given separately to the Secretary and to the "violator," and the bar on commencement of citizen suits during the pendency of federal enforcement proceedings, suggest that Section 1540(g)(1)(A) is directed at on-the-ground "violations" of the Act's substantive provisions—not at the Secretary's administration of the Act.[25] Thus, the "sense of the statute," cf. *Heckler* v. *Edwards*, 465 U.S. 870, 879 (1984), is that an erroneous biological judgment by the Service is

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97th Cong., 2d Sess. 15 (1982). That language from the Senate Report reflects the assumption that the Secretary's failure to comply with the new statutory requirements governing the listing process would not otherwise be subject to challenge under the citizen suit provision.

[25] This conclusion is supported by two other textual features of 16 U.S.C. 1540(g)(1)(A). First, that Section provides for a suit against a person "who is alleged to be in violation" of a provision of the Act or regulations. The phrase "to be in violation" does not extend to allegations of past, completed actions. See *Gwaltney* v. *Chesapeake Bay Foundation*, 484 U.S. 49, 57 (1987). Once the FWS furnishes a biological opinion to an action agency, its role in that consultation is completed. There is no ongoing conduct by which the FWS could be said to continue "to be in violation" of the Act. Second, Section 1540(g)(1)(A) states that the "person[s]" whose violations are covered include "the United States and any other governmental instrumentality or agency." Thus, in referring to "violations" by governmental agencies, the citizen suit provision refers to the agency itself, not the officer who is the head of the agency. See also 16 U.S.C. 1536(a)(2) (referring to the no-jeopardy obligation of each "Federal agency"). By contrast, the citizen suit provision uses the term "the Secretary" when referring to actions taken in administering the Act.

not the sort of "violation" that was intended to be cognizable under Section 1540(g)(1)(A).[26]

ii. The historical development of the ESA and similar citizen suit provisions reinforces that conclusion. As noted above, see note 21, *supra*, a number of federal environmental statutes contain citizen suit provisions patterned after the Clean Air Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1706.[27] The pertinent Clean Air Act provision authorized citizen suits

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or

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[26] The ESA also provides that decisions of the Endangered Species Committee granting or denying exemptions for proposed activities are subject to "judicial review, under chapter 7 of title 5." 16 U.S.C. 1536(n). That provision further supports the inference that administrative decisions concerning the implementation of the ESA are to be reviewed under the APA—subject to the terms and conditions (*e.g.*, the requirement of "final agency action") that the APA imposes—rather than under the citizen suit provision.

[27] The House Report accompanying the ESA stated that the language of Section 1540(g) as originally enacted was "parallel to that contained in the recent Marine Protection Research and Sanctuaries Act of 1972 [MPRSA], and is to be interpreted in the same fashion." H.R. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973). The MPRSA provision was intended, in turn, to "parallel[] that adopted by the Congress * * * in the Clean Air Act." 117 Cong. Rec. 30,852 (1971) (statement of Rep. Dingell).

duty under this chapter which is not discretionary with the Administrator.

42 U.S.C. 1857h-2(a) (1970) (recodified as amended at 42 U.S.C. 7604(a)).[28]

The text and history of the Clean Air Act make clear that suits against the Administrator challenging her implementation of that Act are not cognizable under Section 7604(a)(1). The Clean Air Act requires that challenges to the Administrator's actions be brought directly in the court of appeals, 42 U.S.C. 7607(b), and states that "[n]othing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section," 42 U.S.C. 7607(e). The legislative history

[28] Section 7604(a)(1) of the Clean Air Act, like Section 1540(g)(1)(A) of the ESA, specifically identifies the United States and other governmental entities as potential defendants in a citizen suit. The Senate Report accompanying the Clean Air Act explained that "Federal facilities generate considerable air pollution. Since Federal agencies have been notoriously laggard in abating pollution and in requesting appropriations to develop control measures, it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under" other provisions of the Act. S. Rep. No. 1196, 91st Cong., 2d Sess. 37 (1970). The inclusion of federal entities as permissible defendants in Section 7604(a)(1) suits thus reflects Congress's recognition that federal agencies' on-the-ground activities may place them "in violation of" applicable emission standards. It does not suggest that Congress conceived of errors by the EPA in its administration of the Act as "violations" within the meaning of Section 7604(a)(1). The same principle applies in the ESA context: Section 1540(g)(1)(A) citizen suits may properly be brought to prevent federal land management activities from jeopardizing listed species, for example, but not against the Secretary based on alleged errors in his administration of the Act, including the furnishing of biological opinions in the consultation process under Section 7.

confirms that citizen suits under the Clean Air Act may be brought against the Administrator only where the plaintiff alleges a failure to perform a nondiscretionary duty. See H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. 56 (1970) ("Suits against the Administrator are limited to alleged failure to perform mandatory functions to be performed by him. Suits against violators, including the United States and other government agencies to the extent permitted by the Constitution, would also be authorized.").[29] The ESA citizen suit provision should likewise be construed not to apply to the Secretary's administration of the Act (except for the failure to perform nondiscretionary duties under Section 1533). Cf. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 682-683 n.1 (1983) (Court's interpretation of the word "appropriate" in Clean Air Act attorney's fee provision governs construction of parallel provisions in other environmental statutes).[30]

[29] See also *Kennecott Copper Corp.* v. *Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978) ("the nondiscretionary duty requirement imposed by [the Clean Air Act citizen suit provision] must be read in light of the Congressional intent to use this phrase to limit the number of citizen suits which could be brought against the Administrator"); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 663 (D.C. Cir. 1975) (purpose of nondiscretionary duty requirement was "to limit citizen suits against the Administrator to a chosen few").

[30] The ESA citizen suit provision concededly covers a broader range of "violations" than does the analogous provision of the Clean Air Act. Compare 16 U.S.C. 1540(g)(1)(A) (authorizing suit to enjoin "any person * * * who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof") with 42 U.S.C. 7604(a)(1) (authorizing suit "against any person * * * who is alleged to * * * be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation"). For three reasons, however, that change in language in the ESA does not reflect congressional intent to transform the citizen suit into an alternative

b. In light of the strong evidence that Section 1540(g)(1)(A) does not apply to the Secretary's administration of the Act *at all*, it would be particularly inappropriate to read that Section as an *unusually expansive* judicial review provision, permitting attacks on non-final action that would not be reviewable under the APA. As the courts of appeals have recognized, application of the ESA to federal defendants should be governed by traditional principles of administrative law. In determining whether an action agency's conduct complies with the substantive

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mechanism for judicial review (outside the context of nondiscretionary duties) of the Secretary's administration of the Act.

First, other language in the ESA citizen suit provision itself—most notably the express authorization of suits to compel performance of nondiscretionary duties—reflects the premise that suits alleging secretarial errors in the administration of the Act would not be cognizable under Section 1540(g)(1)(A). See pages 39-40, *supra*. Second, the pertinent legislative history contains no evidence of congressional intent to depart from the scheme established in the Clean Air Act, whereby agency implementation of the statute was subject to challenge under the citizen suit provision only in cases involving failure to perform a nondiscretionary duty. To the contrary, that history indicates that Congress attempted to model subsequent citizen suit provisions after the Clean Air Act. See notes 21 and 27, *supra*.

Finally, the ESA citizen suit provision, although broader than the analogous section of the Clean Air Act, is not unique. Other environmental statutes contain broadly worded citizen suit provisions very similar to Section 1540(g)(1)(A), while containing separate provisions governing judicial review of agency administration. See, *e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972 (citizen suits), 6976 (judicial review); Safe Drinking Water Act, 42 U.S.C. 300j-8 (citizen suits), 300j-7 (judicial review); Toxic Substances Control Act, 15 U.S.C. 2619 (citizen suits), 2618 (judicial review); Noise Control Act of 1972, 42 U.S.C. 4911 (citizen suits), 4915 (judicial review). Those statutes indicate that Congress has not historically regarded errors by the implementing agency as "violations" of a statute within the meaning of the various citizen suit provisions.

no-jeopardy mandate of Section 7(a)(2), for example, a reviewing court should apply an arbitrary-and-capricious standard reflecting deference to agency expertise. The D.C. Circuit has explained:

> Appellants in effect seek to have the trial court substitute its views regarding environmental impacts for those of the agencies which are charged with implementing the ESA. The Act provides no support for such a sweeping result. The citizen suit provision of the Act, relied on by appellants, merely provides a right of action to challenge the agency action alleged to be in violation of the Act or to compel agency compliance with the requirements of the Act. It does not direct trial courts to conduct *de novo* review in adjudicating such actions and we decline to read such a requirement into the Act.

Cabinet Mountains Wilderness v. *Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982) (citation, footnote, and internal quotation marks omitted). The court concluded that "the appropriate standard of review under the ESA is the arbitrary and capricious standard provided by the APA." *Id.* at 686. Accord, *e.g.*, *Sierra Club* v. *Yeutter*, 926 F.2d 429, 439 (5th Cir. 1991); *Environmental Coalition of Broward County* v. *Myers*, 831 F.2d 984, 987 (11th Cir. 1987); *Village of False Pass* v. *Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

Similar reasoning applies to the instant case. The APA requirement of "final agency action," and the decisions of this Court applying principles of finality and ripeness, reflect considered judgments regarding the appropriate timing of legal challenges to the conduct of federal agencies. Nothing in the text or history of Section 1540(g)(1)(A) suggests an intent to depart from those background rules. Thus, even if Section 1540(g)(1)(A) is

construed to provide an alternative mechanism for judicial review of the Secretary's implementation of the ESA, it would not authorize a challenge to the non-final action at issue here.

C. Alternative Avenues Exist By Which A Court May Review Claims That The Service Has Recommended Unreasonably Severe Restrictions On The Use Of Natural Resources

A central theme of petitioners' argument is that if their current claims are not cognizable, there will be no avenue by which a court can review allegations that the Secretary has recommended unreasonably severe restrictions on the use of natural resources. That premise is incorrect. As we explain above, any actions taken by the Bureau in reliance upon the biological opinion are subject to judicial review at the behest of persons injured by them. Persons whose requests for water are denied as a result of the Bureau's adoption of the Service's recommendations would be appropriate plaintiffs to challenge the BOR's actions.[31]

[31] As we explain in the text, plaintiffs may obtain vacatur of an action agency's decision by showing that it was based on a biological opinion that failed to satisfy the arbitrary-and-capricious standard of review. A plaintiff may not prevail, however, simply by persuading a court that the Service identified, or the Bureau adopted, alternatives to a proposed action that go beyond the minimum required to avoid jeopardy to listed species. As noted above, see page 3, *supra*, if the Service concludes that a proposed action is likely to jeopardize the continued existence of a listed species, its biological opinion must identify "reasonable and prudent alternatives" to the proposed action, or else state that no such alternatives exist. See 16 U.S.C. 1536(b)(3)(A); 50 C.F.R. 402.02, 402.14(h)(3). But the "reasonable and prudent alternatives" identified in a biological opinion need not embody the absolute minimum biological requirements needed to maintain the species on the razor's edge of survival and extinction. See 50 C.F.R. 402.02 (definition of "reasonable and prudent alternatives"). The

And in the course of reviewing the Bureau's conduct, the court can examine the biological opinion and the evidence on which it was based. In reviewing the scientific judgments embodied in the biological opinion, moreover, the court would employ the same arbitrary-and-capricious standard applicable to suits brought by environmental plaintiffs contending that actions taken in reliance upon a biological opinion were likely to jeopardize listed species.

Thus, the scientific judgments embodied in a biological opinion may be challenged in court within the context of a suit against an action agency, either by plaintiffs who allege that the opinion is insufficiently protective of listed species, or by plaintiffs who allege that the opinion recommends unreasonably severe constraints on the use of natural resources. The timing and standard of review would be the same in both contexts; the two types of actions would differ only in that they would rest on distinct jurisdictional bases. A plaintiff alleging that an action agency's conduct would jeopardize the continued existence of a listed species could invoke the citizen suit provision of the ESA. That provision identifies the United States and other governmental entities as potential defendants, see 16 U.S.C. 1540(g)(1)(A), and conduct by an action agency that would jeopardize a listed species is properly characterized as a "violation" of the Act. See, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 172, 174 (1978) (Court concluded that Tennessee Valley Authority would "be in violation of the Act if it completed and operated the Tellico

Service therefore does not engage in unlawful "over-regulation" (Pet. Br. 48) simply by identifying reasonable and prudent alternatives that go beyond the minimum steps necessary to avoid jeopardy, particularly in light of the action agency's duty to "insure" that its actions are not likely to jeopardize the species. 16 U.S.C. 1536(a)(2). Nor does an action agency violate the law simply by doing more to protect listed species than the Act requires. See pages 48-49, *infra*.

Dam as planned," because "TVA's proposed operation of the dam * * * [would cause] the eradication of an endangered species") (emphasis omitted).[32]

Petitioners, by contrast, allege that the FWS's biological opinion recommends unreasonably severe limitations on the use of natural resources. If the BOR had denied petitioners' requests for water in reliance upon that opinion, petitioners could have challenged that denial, and could have obtained judicial review of the biological opinion in the course of their suit against the Bureau. The BOR's refusal to release the water would not constitute a violation of the ESA, however, even if it was premised on a biological opinion that was found to be arbitrary and capricious. Nothing in the ESA requires a federal resource management agency to permit the use of natural resources, or to authorize other activities, up to the point at which its actions will jeopardize the continued existence of a listed species.[33] Petitioners therefore could

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[32] In our view, the difficult "zone of interests" questions under the ESA citizen suit provision involve situations very far removed from the present one. Suppose, for example, that the owner of land adjacent to government property complained that logging on the federal land caused dust and noise and thereby hindered his enjoyment of his own land. He might contend in addition that the logging jeopardized the continued existence of an endangered bird species. The property owner might expressly disavow any personal interest in the fate of the bird but argue that he was nonetheless entitled to invoke the ESA citizen suit provision, on the ground that he had suffered injury in fact from the same government conduct that was alleged to violate the ESA. That allegation would surely satisfy Article III; the question is whether the fortuitous relationship between the landowner's injury and the values protected by the ESA would trigger the application of prudential standing requirements.

[33] To the contrary, the ESA requires all federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and

not invoke the ESA citizen suit provision as the basis for a challenge to the Bureau's refusal to release additional water. Cf. *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152-153 (1908) (case is not one "arising under" federal law, within the meaning of a federal jurisdictional statute, where resolution of a state-law action turns on the merits of an anticipated federal defense). Rather, their suit would arise under the APA, or under any federal statute that was alleged to require that the water be released.[34]

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threatened species." 16 U.S.C. 1536(a)(1). The Act provides that "[t]he terms 'conserve', 'conserving', and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. 1532(3). The ESA thus contains an affirmative (albeit generalized) requirement that federal agencies should attempt to *improve* the condition of listed species, not simply avoid threats to their continued existence.

[34] The practical differences between an ESA citizen suit and an APA action are of modest significance. The plaintiff in an ESA citizen suit must generally give 60 days' notice prior to filing his complaint, see 16 U.S.C. 1540(g)(2)(A); the APA imposes no such requirement. On the other hand, an award of attorney's fees appears to be more readily available in a citizen suit than in an APA action. Compare 16 U.S.C. 1540(g)(4) ("The court * * * may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.") with 28 U.S.C. 2412(d)(1)(A) (absent a specific statutory provision governing attorney's fees, fees are to be awarded to a prevailing party in a suit against the United States under the Equal Access to Justice Act (EAJA) "unless the court finds that the position of the United States was substantially justified"); see *Pierce* v. *Underwood*, 487 U.S. 552, 563-568 (1988). EAJA fees may not be awarded, moreover, to prevailing parties who exceed the statute's limits on net worth and number of employees. See 28 U.S.C. 2412(d)(2)(B). In either an APA action or a citizen suit, however, the court will apply the same arbitrary-and-capricious stan-

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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dard of review, giving deference to the scientific and technical judgments of the expert agencies. See pages 46-47, *supra*.

A suit under the APA challenging the Bureau's water allocation decisions would be governed by zone of interests principles, since the zone of interests test is "a gloss on the meaning of § 702" of the APA. *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 395 (1987). The inquiry would focus, however, on whether a potential plaintiff's claim fell within the zone of interests protected by federal statutes governing the Bureau's allocation of water. Petitioners would clearly satisfy that requirement.

APPENDIX

1. Section 1536 of Title 16 of the United States Code provides in pertinent part:

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

* * * * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

2. Section 1540 of Title 16 of the United States Code provides in pertinent part:

§ 1540. Penalties and enforcement

* * * * *

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court

shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary;

except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).